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June 4, 2008

**BY ELECTRONIC FILING**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Re: Notice of *ex parte* communication in WT Docket No. 99-217, Promotion of  
Competitive Networks in Local Telecommunications Markets.

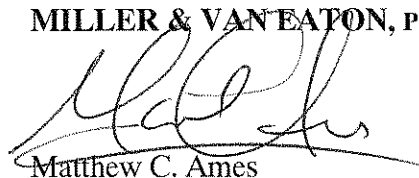
Dear Ms. Dortch:

On June 4, 2008, the attached letter was sent on behalf of the National Multi Housing  
Council and the National Apartment Association to Chairman Kevin Martin, in connection with  
the matter identified above.

Very truly yours,

**MILLER & VAN EATON, P.L.L.C.**

By

  
Matthew C. Ames

Attachment  
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June 4, 2008

The Honorable Kevin J. Martin  
Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

Re: FCC 08-87, Report and Order, WT Docket No. 99-217

Dear Mr. Chairman:

I am writing to express our concern about the Federal Communications Commission's March 19, 2008 Order (Order)<sup>1</sup> prohibiting telecommunications carriers from entering into or enforcing exclusive agreements with owners of residential properties, including apartment buildings.

The National Multi Housing Council and the National Apartment Association represent the nation's leading firms participating in the multifamily rental housing industry. Our combined memberships are engaged in all aspects of the apartment industry, including ownership, development, management, and finance. The National Multi Housing Council (NMHC) represents the principal officers of the apartment industry's largest and most prominent firms. The National Apartment Association (NAA) is the largest national federation of state and local apartment associations. NAA is comprised of nearly 200 affiliates and represents over 51,000 professionals who own and manage more than 6 million apartments. NMHC and NAA jointly operate a federal legislative program and provide a unified voice for the private apartment industry. As you know, NMHC/NAA have been active in various proceedings before the Commission, both individually and as members of the Real Access Alliance (RAA), including the Commission's request to refresh the record in the Competitive Networks proceeding.<sup>2</sup> We have informed the Commission about our views on proposed Commission regulation with implications for the apartment industry.

In our submissions to the Commission over the last decade, we have repeatedly made clear that we support competition for the delivery of communications services. As active participants in the fiercely competitive real estate market, apartment communities fully appreciate how competition can lower prices and improve service and product quality. Indeed, the Commission has in the past recognized that apartment owners have strong incentives for introducing competitive services to their properties, because apartment residents value competition and choice.<sup>3</sup> Resident consumers reward those apartment communities that meet their needs.

NMHC/NAA understand the Commission's need to respond to changes in the dynamic communications market. But we also believe that the Commission cannot effectively respond to those changes without having access to accurate market information and then correctly analyzing that information. We have consistently informed the Commission about the rental apartment industry and relationships between apartment communities and communications service providers.

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<sup>1</sup> *Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order, 23 FCC Rcd 5385 (2008).

<sup>2</sup> Public Notice, 22 FCC Rcd 5632 (2007).

<sup>3</sup> *In the Matter of Telecommunications Services Inside Wiring*, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659, ¶ 61 (1997).

*The American apartment industry...working together for quality, accessible, affordable housing.*

We are very troubled by the Commission's latest Order banning exclusive telephone contracts because that Order misstates and misuses information provided by the real estate industry and others. The Order appears to be part of a disturbing trend of proposing or adopting regulations based on an inaccurate and/or a distorted assessment of the record.<sup>4</sup>

In this particular instance, there is virtually no information regarding exclusive contracts for telephone service in residential buildings before the Commission to support the Order. The Commission last took comment in this docket in 2001 when the focus was commercial—not residential—properties. Because it has now been seven years since those limited comments were submitted, and the information collected at that time focused on commercial office buildings, any market data submitted at that time is not a reliable basis for acting now. Yet the Order cites extensively to material filed in 2001.

We are particularly troubled by the Commission's misuse of information submitted by the RAA in response to the 2007 Public Notice. The Order cites those comments, noting that the RAA's survey of property owners and managers shows that "two percent of the respondents admit to having at least one exclusive arrangement for building access."<sup>5</sup> While this is true, the referenced survey addressed commercial, not residential, buildings.<sup>6</sup> The RAA never addressed residential buildings in its comments. Furthermore, the RAA comments clearly stated that the survey included agreements for Internet service, not only telephone service. The Commission's gross misinterpretation of the RAA survey to make findings regarding telecommunications service in residential buildings was improper and incorrectly led to an erroneous conclusion.

Only eight parties filed comments in response to the Public Notice,<sup>7</sup> and none supplied any information about how often residential owners enter into exclusive access agreements with common carriers for telephone service. NMHC/NAA believe that such contracts are rare, making this a nonissue in 2001 and in the years since. The record before the Commission bears this out.

Qwest was the only commenter to cite even one instance of an exclusive contract for voice service. This example involved a mixed-use development to which Qwest was denied access in 2002. But by Qwest's own admission, the matter was "resolved."<sup>8</sup> Qwest further acknowledged that it had no statistics regarding exclusive agreements in residential buildings. The Order, however, relies on Qwest's obviously unsubstantiated contention that it is "increasingly" encountering exclusive arrangements in residential developments. In other words, based on a single five-year old example, which ultimately proved not to be an exclusive arrangement, the Commission has concluded that regulation of agreements between property owners and common carriers is required.

The Commission ignored relevant information submitted by other parties that was at least as sound as Qwest's. Verizon expressly stated that "there is no such evidence of abuse for telecommunications services."<sup>9</sup> Comcast observed that "it is not clear that exclusive access arrangements are at all common with respect to residential voice services."<sup>10</sup> The Order, however, fails to even note these statements by two major providers of voice service.

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<sup>4</sup> The Commission's recent Order regarding exclusive contracts for video service in residential buildings is under appeal by NMHC and NAA, as well as other parties. One of the grounds for that appeal is that the Commission ignored extensive information submitted by the real estate about the market-based reasons for and impacts of those contracts.

<sup>5</sup> Order, 23 FCC Rcd 5385, at ¶ 12.

<sup>6</sup> Comments of the Real Access Alliance, WT Docket No. 99-217, filed July 30, 2007, at page 7.

<sup>7</sup> Incidentally, the Order refers to comments filed on July 30, 2007, by OpenBand of Virginia, LLC, but it appears that these comments were actually filed on March 12, 2002.

<sup>8</sup> Comments of Qwest, WT Docket No. 99-217, filed July 30, 2007, at pp. 1-2.

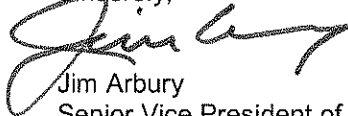
<sup>9</sup> Comments of Verizon, WT Docket No. 99-217, filed July 30, 2007, at p. 2.

<sup>10</sup> Comments of Comcast, WT Docket No. 99-217, filed July 30, 2007, at p. 5.

The Commission's apparent penchant for regulation by press release is especially troubling because the Order purports to extend the Commission's authority to include contracts between apartment owners and telecommunications carriers. For the reasons stated by the RAA in 2001,<sup>11</sup> we do not believe that the Commission has such power or that 47 U.S.C. § 201(b), the statute relied upon by the Commission to justify its ban, properly applies in this context. It is deeply troubling that the Commission would intrude into the issue of private negotiations between apartment owners and telecommunications providers on such thin and misapplied data about the apartment marketplace.

We believe that the types of arrangements banned by the Order are rare and that the Commission's action lacked any reasonable basis. While we do not intend at this point to seek reconsideration or judicial review, the integrity of the regulatory process demands that agencies base their findings on reliable evidence and fair assessments of the record before them. We urge the Commission to reexamine its internal procedures and its decision-making processes to ensure the efficacy of the regulatory process.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim Arbury", written over the printed name.

Jim Arbury

Senior Vice President of Government Affairs

National Multi Housing Council/National Apartment Association Joint Legislative Program

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<sup>11</sup> Further Comments of the Real Access Alliance, WT Docket No. 99-217, filed January 22, 2001, at pp. 34-50, 62-65.